BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	))))	Rulemaking 06-10-005

REPLY COMMENTS OF VERIZON CALIFORNIA INC.

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Verizon submits these comments in reply to the opening comments submitted by parties to this proceeding.[1]

INTRODUCTION

The Digital Infrastructure and Video Competition Act of 2006 (the Act) put in place a major paradigm shift designed to spur competition, private investment in infrastructure, and enhanced products and services to the benefit of consumers. Not only did it take the bold step of moving video franchising from a local to a state regime, it also gave the Public Utilities Commission specific authority to administer this unprecedented, narrowly-defined, and streamlined regime for a fiercely competitive service that is decidedly *not* a public utility service. The Commission must carefully craft new rules that reflect these specific changes and fully implement the Act in the way it was intended. As Verizon stated in its opening comments, the proposed draft General Order and application are excellent steps in the right direction.

Two key issues emerged from a review of opening comments. The first is the need to adhere closely to the Act's provisions, and these comments address specific points raised by other parties in opening comments. In particular, the General Order *must* acknowledge and reflect the Act's structure that clearly allows applicants to initially designate – and freely modify -- their video service

[1] AT&T California (AT&T), California Cable and Telecommunications Association (CCTA), Small Local Exchange Carriers, (Small LECs), Surewest Televideo (Surewest), California Community Technology Policy Group and Latino Issues Forum (CCTPG/LIF), Consumer Federation of California (Consumer Federation), Division of Ratepayer Advocates (DRA), Greenlining Institute (Greenlining), The Utility Reform Network (TURN), League of California Cities and The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (League / SCAN NATOA), and cities consisting of Pasadena, San Jose and a group of cities that filed what appear to be identical comments: Arcadia, Berkeley, Long Beach, Redondo, and Walnut ("City of Arcadia et al.")

areas. The Act's non-discrimination and build requirements were expressly deferred for examination only after several years in order to encourage infrastructure deployment and true competition in a product area that has lacked it for decades. This flexibility is critical to effective implementation of the Act's pro-competitive and investment goals.

The second key issue is the need to protect highly competitively sensitive deployment plans – both the precise areas to be served and the anticipated timeline for doing so. New market entrants in the highly competitive and mature video market complete with existing dominant incumbent providers and must be able to restrict access to this information. In order for applications to be reviewed and processed within the strict time frames established in the Act, the Commission must establish protection procedures as part of its General Order. Verizon proposes a streamlined process for handling confidential information that will allow affected cities access, but at the same time protect this information from distribution to others absent stringent protections.

ARGUMENT

A. WIDE RANGING REGULATION IS NOT PROPER

Several consumer groups commenting on the proposed rules seek to greatly expand the Commission's role into areas where the Act provides no such role. These groups ignore the fact that this proceeding implements a unique form of regulation for the Commission that greatly differs from its historical function. Video service is not a regulated public utility, as the Act made clear, and therefore all the usual trappings of public utility regulation have no place in

the franchising process or subsequent proceedings under the Act. But this is precisely what many of the consumer groups seek.

All such comments in excess of the Act's limitations should be rejected. Examples of such suggestions include the following:

1. Video Service is Not a Regulated Public Utility Service

CCTPG/LIF urge the Commission to "use this proceeding to institute comprehensive regulations over video services," including regulation of "the video service portion of [a consumer's] monthly bill."[2] Both Greenlining and CCTPG/LIF seek to "mirror" the Commission's regulation of utilities by extending to video franchising the Commission's supplier diversity program, monitoring efforts to close the Digital Divide, reviewing availability of in-language customer services[3], assessing the diversity of cable programming, and reviewing employment reporting.[4] All of these violate the Act's express limitations and clear statement that the Commission does not regulate the "rates, terms and conditions" of video service,[5] and therefore they cannot be imposed under the guise of furthering other broad policy goals.[6] Some – such as efforts to dictate

[2] CCTPG/LIF at 3, 6.
[3] Greenlining Exhibit A requested information about Verizon's in-language services to serve as a "template" for other applicants. While any in-language requirements would violate the Act for the reasons explained above, and are not relevant to this proceeding, Verizon provides the following in response to Greenlining's request. Verizon is currently selling FiOS Television and Direct TV through its Multilingual Center in Spanish and plans to add the Asian languages by the end of the year. The Special Needs Center is available to help persons with disabilities purchase such services. Also, the Southern California channel lineup includes an unprecedented array of Spanish channels, International channels, and other channels that focus on minority viewers.
[4] CCTPG/LIF at 11-12, Greenlining at 1-6.
[5] Section 5820(c).
[6] Broad statutory authorizations cannot supersede express legislative direction. Cf. Assembly v. Public Utilities Commission, 12 Cal. 4th 87, 48 Cal. Rptr 2d 54 (broad authority in Public Utilities Code § 701 to "do all things . . . necessary and convenient" does not grant authority to circumvent other specific statutory requirements).

the diversity of programming – may even violate content prohibitions in federal law.[7]

2. The Commission Has No Consumer Protection Role Under the Act

Several parties claim that the Commission must play a role in consumer protection.[8] But the Act clearly provides no enforcement or rule promulgation role to the Commission, instead directing that local entities "*shall* enforce all customer service and protection rules."[9] CCTPG/LIF rely on section 5840(i)(3) as the basis for enforcement of consumer protection by the Commission. But this section merely requires the Commission's issued franchise to contain a statement that the holder is "subject to lawful operation" of its franchise. It cannot form a basis on which to swallow other explicit limitations of the Act and create functions for the Commission not expressly granted to it by the legislature.[10] Likewise, no basis exists for the Commission to establish a video service consumer education program.[11]

B. THE APPLICATION PROCESS IS TIGHTLY PRESCRIBED AND MINISTERIAL

Those parties who unlawfully seek to expand the Commission's regulation of video service role in regulating video service likewise seek to expand the application review process. But the Act's strict timelines for notification of a "complete or incomplete" application,[12] coupled with franchise effectiveness by

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[7] Federal law prohibits local franchising entities from imposing "requirements regarding the provision or content of cable service . . . ." 47 U.S.C. § 544(f)(1).
[8] CCTPG/LIF at 7-8, citing section 5840(i)(3). See also Greenlining at 10-11.
[9] Section 5900(c)(emphasis added).
[10] See footnote 6 infra.
[11] CCTPG/LIF at 9.
[12] Section 5840 (h)(1).

operation of law if the Commission fails to act in a timely manner,[13] demonstrate the ministerial nature of the process. This is echoed in the legislative history, which plainly states that, "[u]nlike the local franchising process, the state-franchising process is intended to be largely ministerial."[14] Accordingly, efforts to expand the application process beyond the express limits in the Act are prohibited and should be rejected. Examples include the following:

1. Initial Service Area Designation Is Not Subject to Substantive Review

Some parties seek comment as to whether an initial service territory designation or a build-out plan is "discriminatory or deficient."[15] But the application process clearly does not contemplate such up front review except in narrow circumstances.[16] Limited socioeconomic information must be submitted for the proposed video service areas as well as the holder's telephone service area, but these are intended for informational purposes only, and do not form the basis for substantive review or rejection of an application, as explained in Verizon's opening comments.[17]

Rather, the Act is designed to spur infrastructure investment and promote robust competition by allowing new entrants the flexibility to initially deploy or upgrade their video networks in the most efficient manner to promote real competition and customer choice in the video services market. The anti-

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[13] Section 5840(h)(4).
[14] Senate Floor Analysis, AB 2987 (August 28, 2006).
[15] CCTPG/LIF at 3.
[16] See Verizon at 10, citing section 5890(d)(where service is provided outside the telephone franchise area, the holder is not a telephone corporation, or there is no other video service offered, a rebuttable presumption of no discrimination exists, but Commission "may review the holder's proposed video service area to ensure that the area is not drawn in a discriminatory manner.").
[17] Verizon at 9-11.

discrimination and build requirements apply as the networks are expanded, and are measured by specific targets of the percentage of low-income households served after several years of operation. The Act recognizes that new entrants need time to deploy their networks, and specifically allows periods of two, three and five years to do so prior to review of the extent of that deployment.[18] In addition, the Act expressly provides that applicants may freely amend those areas,[19] without review or penalty, providing further support for applicants' operational flexibility in designating their initial service area footprints. Therefore, up front restrictions on service territory designation and build requirements find no support in the Act, and would only serve to inhibit infrastructure development and the rapid deployment of advanced technology.

For the same reasons, suggestions that franchise service areas be limited to 750,000 households, include entire telephone service areas,[20] or that five-year build plans be provided,[21] are inappropriate and fundamentally at odds with the Act.

2. The Commission Has No Customer Service Functions Under the Act

CCTPG/LIF assert that the Commission may grant or reject applications "based on the failure to comply with customer service requirements."[22] But as discussed above, the cited section requires only a forward-looking statement from the applicant that it will comply with all video service consumer protection rules, violation of which are subject to increasing penalties for repeated instances

[18] Section 5890.
[19] Amendment of service areas is discussed at greater length in Section E supra.
[20] League/SCAN NATOA at 16.
[21] City of Arcadia et al, at 18-19.
[22] CCTPG/LIF at 6, citing section 5840(e)(1)(B)(ii)(requiring applicant to state in application that it will abide by all consumer protection rules in section 5900).

of violation. An applicant is ineligible to apply only if it is in violation of a final, non-appealable order relating to video service consumer protection rules, not simply allegations of rule violations. Such ineligibility is a factor capable of objective determination, not one that requires consumer input to aid the exercise of Commission authority to grant franchises.

3. Additional Reports Are Not Required

Likewise, the Act's goal of obtaining reports on broadband/video availability and employment do not require customer participation for "proper regulation."[23] These reports will be submitted to the Commission as provided in the Act and will be available to the public for review.[24] No input is required.

CCTPG/LIF asserts that the Commission must create processes to "monitor" or "assist" holders in meeting the Act's build provisions, including determining how community centers will receive free service.[25] However, these requirements are spelled out very clearly in the Act, and consist of submission of specific information by holders. No further Commission process or detail is required.

4. Protests, If Allowed, Should Be Strictly Limited

As Verizon stated in opening comments, the Commission's tentative determination not to allow "protests" in the sense in which that term is traditionally used in Commission practice is reasonable and should remain. This is consistent with the notion that video franchising regulation is really a paradigm

[23] CCTPG/LIF at 7.
[24] The Commission must report holders' employment information annually to legislative committees and make the information available to the public on its website. Section 5920(4)(b). Likewise, service availability information will be available to the public on an aggregated basis. Section 5960(d).
[25] CCTPG/LIF at 9-10.

shift in Commission regulation, and that staff is fully capable of assessing whether an application is complete as prescribed in the Act, without external assistance. Moreover, protests in the traditional sense create a real risk that the Commission's process will run afoul of the timeframes in the Act.

However, consumer groups as well as cities uniformly oppose the Commission's tentative proposal to restrict the ability to protest applications. Some of these parties – for example, city representatives – recognize and support the "ministerial nature of state franchising" and therefore seek an "expedited protest procedure for local governments . . . limited to a determination of whether the application is complete or incomplete."[26] Other parties, however, as discussed above, support the opportunity to protest applications based on factors that far exceed both the Act's requirements and the ministerial nature of the review. No party, however, challenged (nor could they) the Act's strict application criteria and limited timeframes for review. It is these requirements that provide the touchstone for whatever decision the Commission makes on this issue.[27]

Precedent does exist for streamlined registration processes without explicit opportunity for public comment. For example, the Commission currently registers electric service providers (ESPs) in "an exercise of [its] licensing

[26] League/SCAN NATOA at 4, 10-11.

[27] It is worth noting that the application process and timelines appeared very early in the legislative amendment process and remained relatively unchanged, regardless of the identity of the agency selected to administer them. This further bolsters the view that video franchising is truly a paradigm shift in Commission regulation. Therefore the Legislature clearly intended for the Commission to conform its processes to the Act, not vice versa.

function" without regulating the rates, terms or conditions of service provided by ESPs,[28] and no opportunity for public comment or protest exists in that process.[29]

Although the Act is silent[30] on the specific issue of whether protests should be required or permitted in the application process, the Commission has previously recognized that "[l]egislation need not spell out in minute detail the manner in which an agency is to proceed, or eliminate all discretion."[31] Clearly, the Commission's determination to delegate review to the Executive Director is consistent with the Act's criteria and timelines, and no party has seriously challenged that aspect of the process.[32] As the Commission has acknowledged, administrative agencies "must be able to delegate broadly, because without such delegation, the wheels of government would grind to a halt."[33] The details of the Act and the Commission's General Order provide ample guidance to the Executive Director in the performance of these functions, including rejection of any comments that might exceed a proper scope as determined by the Commission.[34]

Accordingly, the Commission has discretion to structure its process within the bounds of the legislation. Any such process must comply with the Act's

[28] Pub. Util. Code section 394(f).
[29] See, e.g., D.97-05-040 (adopting registration procedures and form); D.03-12-015 (expanded registration procedures).
[30] Seeking to fill this silence, a number of cities assert that the franchise renewal process must comply with federal law. City of Arcadia et al at 11-13; League/SCAN NATOA at 9-10. However, the franchise renewal provisions of federal law are *permissive*, not mandatory: 47 U.S.C. § 546(a)(1) provides that a franchising authority "may" commence a proceeding which affords the opportunity for public notice and participation, and thus the Commission's determination either way to allow protests with regard to a renewal application would be "consistent" with federal law.
[31] Rehearing of Resolution M-4801, D.02-02-049, 2002 Cal. PUC LEXIS 162, *6 (citing cases).
[32] The Consumer Federation (at 4-5) questions whether delegation is appropriate, but fails to acknowledge the scope of the Commission's authority in this regard. The Executive Director is empowered under section 309 of the Public Utilities Code to employ staff "to perform the duties and exercise the powers conferred on the commission by law." See also D.02-02-049.
[33] M-4801, D.02-02-049, 2002 Cal. PUC LEXIS 162, *7.
[34] Such authority is critical to meet the Act's timelines.

limitations on the scope of the application, the timelines for issuance, the largely ministerial nature of the process described in the Act, and the Executive Director's delegated authority to make a determination as to whether a franchise application is complete or incomplete. Efforts to use any public comment process for free-ranging inquiries into topics not enumerated in the Act must be rejected. Therefore, if protests are allowed, any comments must be strictly limited to the completeness of the items provided in the applications, and must be capable of submission and resolution within the timeframes provided in the Act.[35]

5. The Proposed Application Fee Is Reasonable

Several cities complain that the proposed application fee of $2,000 "grossly" underestimates the amount of time the Commission staff will spend reviewing applications, compared to typical local franchise application fees of $7,500 to $10,000.[36] These comments should be accorded no weight. Local franchise application fees are irrelevant because the state franchising process is quite different and far more ministerial. Moreover, there is no apparent requirement that local franchise application fees be cost-based.[37] In addition, this request contravenes the ministerial nature of the review process, as acknowledged by the cities' representatives (which did not object to the application fee). The Commission has adequately supported its proposed fee, and it should remain as is.

[35] Ideally, no more than 15 days should be permitted for comment, and 5 for reply.
[36] City of Arcadia et al at 16. These comments mention Commissioner time as well as staff time. Id. But the General Order's proposal to delegate review to the Executive Director means that Commissioners will not be involved in the process.
[37] Even if local fees were cost-based, the costs of funding consultants and attorneys in lengthy local franchise negotiations and review processes bears no relation to the Commission's streamlined process.

City suggestions that other franchise-related processes (e.g., service territory amendments, change of control notifications, or resubmission of incomplete applications)[38] also be assessed an application fee are not justified. Most of these functions are subject to the *notice* provisions of section 5840(m), not the application *review* process of section 5840(h). Therefore, another application fee is not authorized. Submission of information needed to *complete* a pending application is part of the Commission's work in processing applications and is covered by existing fees, including the ongoing user fee. No new fee is not justified. Only franchise renewals under the Act warrant imposition of a new application fee.[39]

C. BOND REQUIREMENTS SHOULD NOT BE EXPANDED

Virtually all cities argue that the Commission's proposal to require a $100,000 financial showing through the option of a bond is insufficient, and seek instead a much larger amount allegedly consistent with those imposed on existing cable operators – as high as a million dollars[40] – or minimum bond per number of customers served, with individual cities named as obligees.[41] But this is neither appropriate nor necessary. In fact, the cities confuse bonds with two distinct purposes – those provided as a safeguard to cover initial estimated start-up costs, and those addressing specific and actual operational costs which may be drawn down by cities after-the-fact. The Commission's proposed "adequate assurance" is not intended to address the second issue -- the totality of potential

[38] League/SCAN NATOA at 8; Arcadia et al at 16-17.
[39] Section 5850(b)(same criteria and process of section 5840 apply to renewal registration)
[40] City of Arcadia et al at 7-8 (small cities often require bonds of $100,000; Los Angeles bonds total over $1 million).
[41] City of Pasadena at 3 (proposing $500,000 or $100,000 bond per 20,000 customers served).

right-of-way claims statewide against an operator. Rather, it is to insure adequate *initial* capitalization as a start-up business, with revenues covering current operating expenses as the business grows.[42] The Commission has long recognized that a substantially higher initial requirement would be a barrier to entry and deter competition.[43] The overarching purpose of the Act is to spur competition, and any elevated financial showing applicable only to video service providers would conflict with that goal. Moreover, as Verizon explained in its opening comments,[44] the requirement of a $100,000 financial showing is consistent with that imposed by the Commission on other facilities-based communications companies, and there is no reason to change it here.

Finally, no bond related to use of rights-of-ways of any amount is necessary. Under the Act, local entities maintain control of the means of access to the public rights of way as they do today,[45] including the right to issue encroachment permits, assess reasonable cost-based fees, and require bonds when appropriate.[46] Nothing in the Act or the Commission's proposed rules prevents a local entity from continuing to do so.

D. CONFIDENTIALITY OF COMPETITIVELY SENSITIVE INFORMATION MUST BE PRESERVED IN THE HIGHLY COMPETITIVE VIDEO AND BROADBAND MARKETS

Several commenters representing companies expected to apply for state video franchises have stressed the need for confidential treatment of certain business information. AT&T points out that the Commission is obligated to

[42] D.93-05-010, 1993 Cal. PUC LEXIS 381, * 21-22 (financial requirements for switchless and facilities-based resellers intended to prevent undercapitalization of start-up business).
[43] Id. at *20 (minimum financial requirement is a regulatory entry barrier).
[44] Verizon at 6, note 11.
[45] Section 5885(a).
[46] Government Code section 50030 (requiring cost-based permit fees for right-of-way access).

protect trade secrets, including but not limited to an applicant's "proposed video service area footprint and expected deployment dates."[47] CCTA claims that annual video and broadband information will contain some highly sensitive competitive information.[48] Verizon raised similar concerns in its opening comments, and concurs with those made by AT&T and CCTA.

1. Confidential Information Is Governed By General Order 66-C

Treatment of any confidential information submitted to the Commission is governed by General Order 66-C, which provides in pertinent part that matters not open to public inspection include"[r]ecords or information of a confidential nature furnished to, or obtained by, the Commission . . . [including] [r]eports, records and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage."[49] Information of a confidential nature will be submitted to the Commission in the applications and hence will be covered by these provisions.

Verizon concurs with AT&T that certain information in the application will be competitively sensitive. In particular, the expected date of deployment for video service in each area of its footprint will be highly sensitive, at least for new market entrants such as Verizon and AT&T who are challenging incumbent providers.[50] As Verizon explained in opening comments, because this

[47] AT&T at 5.
[48] CCTA at 13.
[49] G.O. 66-C, section 2.2(b).
[50] Operations in other states have shown that incumbent cable companies can and do launch targeted marketing campaigns in response to Verizon's market entry, often in response to actions such as construction permits that signal the imminent availability of service. Providing a detailed roadmap of anticipated product rollout will only make competitors' targeted marketing easier, and is highly competitively sensitive information.

information was requested at such a granular level,[51] the application will signal new entrants' business plans and the location of their intended video customers to all of their competitors (cable, satellite, VoIP and other). In Verizon's case, because its video service offering -- FiOS -- carries the capability for substantially higher broadband speeds than the copper network, this competitive sensitivity will affect not only video but all broadband services, both residential and business. In addition, because Verizon's network construction process is more labor and capital intensive, with longer construction periods, the potential competitive threat will be that much greater.

2. The Commission Must Order a Streamlined Confidentiality Process for the Application

It is virtually assured that one or more applications will contain information deemed competitively sensitive. The Commission must establish procedures now to handle this information, as local entities affected by an application must "concurrently" receive a copy of each application.[52] As Verizon noted in opening comments, this information should be subject to confidential treatment under Public Utilities Code section 583. While parties who regularly appear before the Commission are well-versed in the usual manner of filing such information, and seeking access to it for purposes of participating in a proceeding, cities may well be unfamiliar with these procedures.

If usual Commission practice were to be followed, applicants would file concurrent motions with their applications seeking proprietary treatment for those

[51] The service area must be defined by a "collection" of Census Bureau Block numbers (Verizon understands this to be at a census tract basis, as explained in opening comments at 11-12) and the expected date of deployment must be provided in "each of the areas identified" in the footprint. Section 5849(e)(6), (8).
[52] Section 5840(e)(1)(D).

portions deemed confidential. Pending a ruling on confidentiality, a presumption of confidentiality would prevail. Redacted versions of applications would be provided to all affected cities as required by section 5840(e)(1)(D), unless a city signed a non-disclosure agreement in advance governing handling of the confidential portions of the application, in which case it would receive the confidential version. Various form agreements for this purpose have been in widespread use at the Commission for many years, and most parties are very familiar with their terms.

However, this process would be extremely burdensome to administer in the short time frame of the application process, since dozens of cities will likely be affected by video franchise applications in early January 2007. Processing, reviewing and negotiating individual nondisclosure agreements with each affected city would be time-consuming, confusing and inefficient. Likewise, any ruling on confidentiality would likely not be issued until well after the franchise process was complete.

In order to streamline the application process, avoid confusion and delays in processing non-disclosure agreements, and provide certainty to all parties involved, the Commission should make clear that General Order 66-C applies to information submitted in connection with the application process. Applicants must designate any information for which confidential treatment is sought as falling within one of the categories enumerated in General Order 66-C. In addition, the Commission should establish a presumption (pending Commission ruling) that information designated as confidential under General Order 66-C by an applicant or a holder shall be subject to confidential treatment, not disclosed

to any other person, and shall be used for the limited purpose of participating in the state franchising process.

Cities are certainly familiar with dealing with confidential information as part of the local franchising process, as they are currently bound by Penal Code section 637.5(c). This section, which holders must comply with pursuant to section 5900(b) of the Act, establishes privacy rules for cable providers, and primarily deals with individual subscriber information. But it also expressly allows local franchising authorities to obtain information needed to monitor franchise compliance, and provides that such information "obtained by local franchising authorities shall be used *solely* for monitoring franchise compliance and *shall not be subject to the California Public Records Act*" set forth in Government Code section 6250 et seq.[53] The Commission should therefore provide that any information obtained by cities pursuant to the application process or any process under the Act is subject to the provisions of General Order 66-C as well as these provisions. This will streamline the process for cities, the largest group of entities with mandated access to applications under the Act, and facilitate the Act's goal of streamlined franchise processing

With regard to other persons who may wish to receive applications, the Act is silent. However, public redacted versions should be available as contemplated under General Order 66-C. The Commission should rule that confidential information contained in applications, however, need not be provided to any other person absent execution of a suitable non-disclosure agreement. The same process should be used for complaints, investigations, reporting, or

[53] Penal Code section 637.5(c) (emphasis added).

other subsequent proceedings under the Act (except franchise renewal, which follows the application process).

To implement these recommendations, Verizon proposes the following additional language as part of the General Order and application:

General Order

VIII. Handling of Confidential Information

General Order 66-C applies to confidential information submitted in any proceeding under this Order, including applications. Applicants and holders must designate the basis for which confidential treatment is sought under General Order 66-C, and such information shall be presumed confidential pending a Commission determination. Such information shall be subject to confidential treatment, not disclosed to any other person, and used for the limited purpose of participating in the proceeding under this Order. Local entities affected by any proceeding under this Order shall receive such information subject to these provisions as well as those of Penal Code section 637.5.

Appendix A

Question XX.

Please clearly label as "CONFIDENTIAL" any information for which you seek confidential treatment pursuant to General Order 66-C, and specify the basis on which such confidential treatment is sought.

E. THE PROCESS FOR AMENDING VIDEO FRANCHISE SERVICE AREAS NEED NOT TRIGGER A SUPPLEMENTAL APPLICATION

AT&T notes that the Act permits the Commission to establish procedures for amending a franchise to reflect service area changes, but carefully prescribes the nature of those changes.[54] This point is well-taken, and should be incorporated. Service area amendments should be freely permitted in order to facilitate and expedite infrastructure deployment and real video competition. In addition, the change proposed by AT&T follows well-established rules of

[54] AT&T at 3

statutory interpretation by giving effect to *all* sections of a statute and interpreting them in a consistent manner.

The Commission's General Order proposes to require a holder to seek *permission* to *amend* its video service territory by filing a supplemental application.[55] This process, however, conflicts with section 5840(m)(6), which instead requires the holder to *notify* the Commission within 14 days of "a *change* in one or more of the service areas of this division that would increase or decrease the territory within the service area." This latter language includes, of course, the video service area. Like all the changes enumerated in section 5840(m), this is an after-the-fact notice, not an application.

Section 5840 (f) also addresses service area amendments, allowing the Commission to "establish procedures for a holder to *amend its franchise* to reflect changes in its service area." To give effect to both this and section 5840(m)(6), the two must be harmonized. The most reasonable way to so is to interpret this as a ministerial process to conform an existing franchise to service territory changes *that have already occurred*. Such a process is needed because, unlike the other changes enumerated in section 5840 (m), service area changes are not simple ones that the Commission can implement itself by appending information to the franchise (e.g., as with a name change or transfer). Rather, the holder must submit either a new "electronic template" or a new GIS boundary in digital format on a CD.[56] Doing so will conform the holder's existing franchise to the new service territory, precisely the result contemplated by section 5840(f). Such a change does not require submission of a new supplemental application, but

[55] General Order at 18, section 2.
[56] Appendix A at 5-6 (Question 14)(describing format of video service area description).

rather a simple amendment (e.g., submission of the template or CD) to conform the actual authorized *franchise* to the amended service *area*.

To implement this change, Verizon concurs with the redlines proposed by AT&T in its opening comments.

F. TURN'S PROPOSAL FOR EXPANDED ILEC-ONLY CROSS-SUBSIDY MONITORING IS UNNECESSARY AND INCONSISTENT WITH THE ACT

Both TURN and DRA propose that cross-subsidy language regarding incumbent basic telephone prices be included in the General Order. However, this process does not relate to video franchising nor to video service providers, but only to incumbent telephone providers, and should not be included in the General Order. There is ample opportunity to address these issues, if necessary, in proceedings related to telecommunications.

Nor would this OIR be the proper forum to address the monitoring proposed by TURN. The Commission is examining the monitoring of regulated telecommunications operations in Phase II of the Uniform Regulatory Framework (URF) proceeding under the standards and procedure set forth in the URF Decision.[57] The Commission should not prejudge the outcome of that phase by implementing a monitoring regime outside of URF. Such a result would violate the principle of competitive and technological neutrality adopted in URF by singling out one set of competitors (the wireline incumbents) over others (the cable incumbents who also provide competing telephone service). Expansive ILEC monitoring of cost allocations, video investment and expenses, and other

[57] D.06-08-030 at Finding of Fact 103, Conclusion of Law 58.

data would also go far beyond the Act's requirements and would violate the Act's intent to "create a fair and level playing field" for competitors.[58]

Moreover, TURN's cross-subsidy analysis is a classic example of the kind of anticipatory regulation that the Commission should avoid. At bottom, TURN contends, erroneously, that "the ILECs are 'laying fiber away' on their regulated books of account, to be recovered from future basic service rate increases."[59] Based on this errant premise, TURN contends that *any increase* in the price of stand-alone, primary line basic residential service[60] would "automatically *have the potential* to violate" the statute because it *could* support video related investments and expenses.[61] TURN then proposes an array of new, onerous monitoring requirements to avoid this supposed "problem." TURN's analysis is fundamentally flawed for a number of reasons, and should be rejected.

First, TURN's own data clearly show that video costs are being properly allocated to non-regulated accounts, not vice versa, as TURN contends. TURN's *Table 1*, which depicts the percentage allocation of cable and wire facilities between regulated and non-regulated accounts, shows that the dollars Verizon invested in *non-regulated* cable and wire facilities has *increased substantially* over the last few years, growing from zero in 2003, to $27 million in 2004, to over $63 million in 2005 as Verizon has begun deploying FiOS. Accordingly, these data show a substantial increase in the percentage allocated to non-regulated accounts. Likewise, *Table 2* contradicts TURN's core contention. It shows

[58] Section 5810(2)(A).
[59] TURN at 12.
[60] Referred to hereafter as "basic residential" service.
[61] TURN at 9, 15–16 (emphasis added), citing Section 5940: "The holder of a state franchise under this division who also provides stand-alone residential primary line, basic telephone service shall not increase this rate to finance the cost of deploying a network to provide video service.".

increases in *both* fiber and metallic sheath kilometers, with the ratio of fiber-to-metallic deployment being fairly stable from 1999–2005 and the amount of fiber on the regulated books actually decreasing from 2004 to 2005. Therefore, the data TURN itself relies upon reveals no "problem" requiring a regulatory "solution," only proper allocations of video costs consistent with applicable FCC accounting standards.[62]

Second, TURN's claim ignores the Commission's finding in URF that the market for basic residential service is robustly competitive.[63] In such an environment, prices are market-driven; incumbents like Verizon "lack the market power needed to sustain prices above the levels that a competitive market would produce."[64] Basic residential price increases, therefore, cannot be assumed to "automatically" violate Section 5940 since they are constrained by competition, not driven by the need "to finance" the cost of deploying a video network.

Third, TURN's claim inappropriately implies that residential service revenue is earmarked for the cost of providing video service. In practice, funding of costs comes from a variety of sources in the aggregate, including company operations, shareholders, and creditors and is not traceable to any single source. The identity of the service that generated cash (ignoring for the moment whether or not the service's revenue covered its cost) is lost in the aggregation; therefore, it cannot be said that basic residential price increases would violate Section 5940. Such a claim assumes, erroneously, that the Legislature intended to adopt a strict-liability standard for cross-subsidization based solely on the existence of

[62] Verizon allocates non-regulated costs consistent with FCC Part 64 rules. Part 64 results are audited annually by an independent outside auditor.
[63] D.06-08-030, Finding of Fact 50.
[64] *Id*.

basic residential price increases. There is nothing in the statute or the legislative history to support such an assumption. On the contrary, the plain meaning of the statute clearly implies a finding of intent to engage in improper cross-subsidization, *i.e.*, raising basic residential prices for the purpose of "financing" the cost of deploying a video network.

Fourth, TURN's claim assumes, without basis, that basic residential prices are set above cost. Clearly, where basic local service prices are below cost, there can be no resulting profits to support other services, regardless of the level of competition for basic services. In other words, in order for it to even be possible for basic residential service "to finance" the cost of deploying a video network, the service must produce enough revenues to cover its costs. TURN has failed to demonstrate this fact.

Fifth, even assuming that basic residential prices are above cost in a particular geographic area, it does not mean that basic residential prices in the aggregate are above cost. Prices in low-cost areas that are above cost may offset prices that are below cost in high-cost rural areas. If basic residential prices are below cost in the aggregate, as discussed above, then they could not be "financing" video investment.

In short, TURN has misconstrued Section 5940 and failed to show any evidence that a cross-subsidy "problem" exists. For these reasons alone, the Commission should reject TURN's monitoring proposal as unnecessary.

CONCLUSION

Again, Verizon commends Commissioner Chong and her diligent staff for producing such a thorough implementation proposal for AB297. In order to more fully reflect the provisions of that legislation and speed the availability of competition in the video services market, however, Verizon recommends that the Commission implement the proposed revisions to the General Order and draft application form identified here and in its opening comments.

Dated: November 1, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 711 Van Ness Ave., Ste. 300, San Francisco, CA 94102; I have this day served a copy of the foregoing:

REPLY COMMENTS OF VERIZON CALIFORNIA INC.

by electronic mail to those parties on the service list shown below who have supplied an e-mail address, and by U.S. mail to all other parties on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 1st day of November, 2006, at San Francisco, California.

/s/Sonja Killingsworth
SONJA KILLINGSWORTH

Service List:
Rulemaking 06-10-005